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WAN ROHIMI WAN DAUD & ANOR v. ABDULLAH CHE HASSAN & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
B ABDUL RAHMAN SEBLI JCA
[CIVIL APPEALS NO: D-02-1850-10-2014 & D-02-1881-11-2014]
27 OCTOBER 2015

C ***CIVIL PROCEDURE:*** *Accounts – Taking of accounts – Application for – Judgment paid into solicitor's firm trust account – Whether fees charged on contingency basis – Whether solicitors served invoices – Whether applicants entitled to order that account be taken – Rules of Court 2012, O. 43*

D ***LEGAL PROFESSION:*** *Duty to client – Fiduciary duty – Application for taking of accounts – Judgment sum paid into solicitor's firm trust account – Whether solicitors accounting party to clients – Whether payments made in capacity as solicitors for clients – Whether payments received by solicitor in capacity as fiduciaries for clients*

E The appellants ('the defendants') were partners of a legal firm ('the firm') which had acted for the 271 respondents ('the plaintiffs'), who were settlers in Rancangan Felda Kemahang. The plaintiffs successfully obtained judgment against Lembaga Kemajuan Tanah Persekutuan ('FELDA') and two others for damages in the sum of RM7,810,000 ('the judgment sum'). Pending the disposal of FELDA's appeal to the Court of Appeal, the judgment sum
F together with interest amounting to RM11,322,592 was paid into a joint stakeholder's account comprising solicitors for FELDA and the firm. The Court of Appeal dismissed FELDA's appeal and FELDA's application for leave to appeal to the Federal Court was unsuccessful. The judgment sum was subsequently paid into the firm's trust account. The plaintiffs initiated a claim at the High Court for an account to be taken of the judgment sum. In
G dismissing the plaintiffs' claim, the trial judge held that (i) the plaintiffs were aware of the judgment sum and interest which was obtained but the defendants had a duty to explain to the plaintiffs why they were only paid RM19,000 when according to the judgment sum, the plaintiffs were each entitled to receive RM30,000; (ii) the plaintiffs had not been served with the
H invoices for the legal fees deducted by the defendants; (iii) the plaintiffs had given authority to a committee to act on their behalf and it was agreed that the legal fees were on a contingency basis; and (iv) the legal fees should be calculated at the rate of 30% and the plaintiffs were entitled to receive 70% of the judgment sum. Hence, the present appeals. The issues highlighted for
I the court's determination were: (i) whether the fees were charged on a contingency basis; (ii) whether the invoices issued by the defendants for the fees were served on the plaintiffs; and (iii) whether the plaintiffs were entitled to an order that an account be taken pursuant to O. 43 of the Rules of Court 2012.

Held (allowing plaintiffs' appeal in part; dismissing defendants' appeal with costs)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The fact that the fees were charged on a contingency basis was not really contested. Based on evidence, the initial rate was 50% of the judgment sum recovered and the rate was reduced to 35% subsequently. The trial judge's finding that there was a contingency fee arrangement was consistent with the facts disclosed in evidence. However, there was an erroneous assumption of the facts and pleaded case. The revised legal fees being a contingent fee payment was not a pleaded issue. As such, the trial judge erred in making a finding on an unpleaded issue of fact and law. Accordingly, the trial judge's finding on this point was set aside. (paras 22, 31 & 32)

(2) The trial judge's finding that the plaintiffs had not been served with the invoices was consistent with the totality of the evidence. Since the invoices were never served, the defendants' argument that there was no challenge of the invoices ran hollow as it was impossible for the plaintiffs to challenge the invoices. The defendants' argument that they were entitled to deduct the revised legal fees was a non-starter. (paras 23 & 33)

(3) In dismissing the plaintiffs' application for an account, the trial judge did not address his mind to the question of whether the defendants were an accounting party to the plaintiffs. The payments were made to the defendants in their capacity as solicitors for the plaintiffs. As solicitors for the plaintiffs in the FELDA suit, the defendants stood in a fiduciary relationship of trust and confidence with the plaintiffs. Accordingly, the defendants were fiduciaries and the payments were received by the defendants in their capacity as fiduciaries for the plaintiffs. Consequently, the defendants were liable to pay the judgment sum to the plaintiffs. As such, the defendants were an accounting party to the plaintiffs. (paras 27, 28 & 29)

(4) The trial judge had taxed the amount due as legal fees even though it was not a consideration before him. There is no provision in law enabling the trial judge to do that. There are prescribed procedures for the taxation of a solicitor's bill of cost under the Legal Profession Act 1976. There was a clear misdirection on the part of the trial judge. Thus, His Lordship's decision to tax the amount due as legal fees was set aside. (para 34)

Bahasa Malaysia *Headnotes*

Perayu-perayu ('defendan-defendan') adalah rakan kongsi firma guaman ('firma') yang bertindak bagi pihak 271 responden ('plaintif-plaintif'), iaitu peneroka-peneroka Rancangan Felda Kemahang. Plaintif-plaintif berjaya

mendapat penghakiman terhadap Lembaga Kemajuan Tanah Persekutuan ('FELDA') dan dua yang lain bagi ganti rugi berjumlah RM7,810,000 ('jumlah penghakiman'). Sementara menunggu pelupusan rayuan FELDA ke Mahkamah Rayuan, jumlah penghakiman berserta faedah berjumlah RM11,322,592 dibayar dalam akaun pemegang bersama amanah harta yang terdiri daripada peguam cara FELDA dan firma. Mahkamah Rayuan menolak rayuan FELDA dan permohonan FELDA untuk kebenaran merayu ke Mahkamah Persekutuan juga tidak berjaya. Jumlah penghakiman dibayar dalam akaun amanah firma. Plaintif-plaintif memulakan tuntutan di Mahkamah Tinggi bagi pengambilan suatu akaun dalam jumlah penghakiman. Dalam menolak tuntutan plaintif-plaintif, hakim bicara memutuskan bahawa (i) plaintif-plaintif sedar akan jumlah penghakiman dan faedah yang diperolehi tetapi defendan-defendan mempunyai tugas menerangkan kepada plaintif-plaintif mengapa mereka hanya dibayar RM19,000 sedangkan menurut jumlah penghakiman, mereka masing-masing layak menerima RM30,000; (ii) plaintif-plaintif tidak diserahkan dengan invois bagi yuran guaman yang telah dipotong oleh defendan-defendan; (iii) plaintif-plaintif telah memberi kuasa kepada satu jawatankuasa untuk bertindak bagi pihak mereka dan dipersetujui bahawa yuran guaman adalah atas dasar kontingensi; dan (iv) yuran guaman harus dikira pada kadar 30% dan plaintif-plaintif berhak menerima 70% jumlah penghakiman. Oleh itu, rayuan-rayuan ini. Isu-isu yang diutarakan untuk diputuskan oleh mahkamah adalah (i) sama ada yuran dikenakan atas dasar kontingensi; (ii) sama ada invois-invois yang dikeluarkan bagi yuran telah diserahkan kepada plaintif-plaintif; dan (iii) sama ada plaintif-plaintif berhak mendapat perintah pengambilan suatu akaun di bawah A. 43 Kaedah-Kaedah Mahkamah 2012.

Diputuskan (membenarkan sebahagian rayuan plaintif-plaintif; menolak rayuan defendan dengan kos)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Fakta bahawa yuran dikenakan atas dasar kontingensi tidak dipertikaikan. Berdasarkan keterangan, kadar asal ialah 50% daripada jumlah penghakiman yang diperolehi dan kadar tersebut kemudiannya dikurangkan kepada 35%. Dapatan hakim bicara bahawa perancangan yuran kontingensi selaras dengan fakta yang didedahkan dalam keterangan. Walau bagaimanapun, terdapat kekhilafan anggapan fakta dan kes yang diplidkan. Yuran guaman yang disemak iaitu bayaran yuran kontingensi bukan isu yang diplidkan. Oleh itu, hakim bicara terkhilaf dalam memutuskan tentang isu fakta dan undang-undang. Dengan itu, dapatan hakim bicara tentang hujah ini diketepikan.

(2) Dapatan hakim bicara bahawa plaintif-plaintif tidak diberikan invois-invois selaras dengan keseluruhan keterangan. Oleh kerana invois-invois tidak diserahkan, hujahan defendan-defendan bahawa invois-invois tidak dicabar mempunyai kelompangan kerana tidak mungkin bagi plaintif-

plaintif untuk mencabar invois-invois tersebut. Hujahan defendan-defendan bahawa mereka berhak memotong yuran guaman yang telah disemak seharusnya gagal.

(3) Dalam menolak permohonan plaintif-plaintif terhadap permohonan bagi akaun, hakim bicara tidak mengarahkan mindanya ke arah soalan sama ada defendan-defendan adalah pihak perakaunan untuk plaintif-plaintif. Bayaran dibuat kepada defendan-defendan dalam kapasiti mereka sebagai peguam cara plaintif-plaintif. Sebagai peguam cara plaintif-plaintif dalam guaman FELDA, defendan-defendan mempunyai hubungan fidusiari amanah dan keyakinan dengan plaintif-plaintif. Oleh itu, defendan-defendan adalah fidusiari dan bayaran diterima oleh defendan-defendan dalam kapasiti mereka sebagai pemegang amanah buat plaintif-plaintif. Dengan itu, defendan-defendan bertanggungan membayar jumlah penghakiman kepada plaintif-plaintif. Defendan-defendan adalah pihak perakaunan untuk plaintif-plaintif.

(4) Hakim bicara telah mentaksir jumlah yang terhutang sebagai yuran guaman walaupun pertimbangan ini tidak dikemukakan terhadap beliau. Tiada peruntukan undang-undang yang membenarkan hakim bicara berbuat demikian. Terdapat prosedur-prosedur taksiran bil peguam cara yang dinyatakan dalam Akta Profesion Guaman 1976. Jelas terdapat salah arah oleh hakim bicara. Oleh itu, keputusan beliau untuk mentaksir jumlah terhutang sebagai yuran guaman diketepikan.

Case(s) referred to:

Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal [2013] 2 CLJ 734 CA ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 66

Legal Profession Act 1976, ss. 26, 112(1)(b)

Rules of Court 2012, O. 43

For the appellants - Malik Imtiaz Sarwar (Pavandeep Singh, Yusfarizal Yusoff & Mohd Faizi Che Abu with him); M/s Tengku Amalin' A-Ishah Putri, Faizi & Wan Rohimi

For the respondents - Mohd Yaacob Bakanali (Azmer Mohd Saad with him); M/s Lainah Yaacob & Zulkepli

[Editor's note: Appeal from High Court, Kota Bharu; Civil Suit No: 22-146-07-2011 (overruled in part).]

Reported by Najib Tamby

A

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

B **[1]** The two appeals herein relate to a decision of the High Court sitting in Kota Bharu which allowed part of the plaintiffs' claim whereby the defendants were required to produce particulars of each of the plaintiffs' entitlements to the judgment sum.

[2] Appeal 1850 is the defendants' appeal whilst Appeal 1881 is the C plaintiffs' appeal. In this judgment, the parties shall be referred to as they were in the court below.

The Salient Facts

[3] The 271 plaintiffs are settlers in Rancangan Felda Kemahang.

D **[4]** The defendants are partners of a legal firm ("the firm") which had acted for the plaintiffs to initiate proceedings against Lembaga Kemajuan Tanah Persekutuan ("FELDA") and two others for damages ("the FELDA suit").

[5] On 13 January 2008, the plaintiffs obtained judgment against FELDA E and two others for damages in the sum of RM7,810,000 together with interest and costs.

[6] Pending the disposal of FELDA's appeal to the Court of Appeal, the judgment sum together with interest amounting to RM11,322,592 was paid into a joint stakeholder's account under the names of Messrs Wong Lu Peen F & Tunku Alina, solicitors for FELDA and the firm as solicitors for the plaintiffs. On 26 June 2009, the Court of Appeal dismissed FELDA's appeal and affirmed the decision of the High Court. FELDA's application for leave to appeal to the Federal Court was dismissed. FELDA's subsequent application to the Federal Court to review the dismissal of the leave G application was also dismissed. After the dismissal of the review application, the judgment sum was paid into the firm's trust account.

[7] Out of the judgment sum, the defendants have paid a sum of RM19,000 to each of the plaintiffs totalling RM6,726,000 leaving a balance of RM4,510,983 and the additional interest of RM85,589 and costs in the H possession of the defendants.

Plaintiffs' Claim

[8] In essence, the plaintiffs' claim is for an account to be taken of the judgment sum on the following terms as reflected in para. 23 of the amended I statement of claim:

> (a) Satu akaun untuk bayaran-bayaran yang diterima oleh Defendan Pertama Defendan Kedua berkenaan dengan atau mengenai penghakiman bertarikh 13.1.2008 yang diperolehi oleh Plaintif-

Plaintif terhadap Lembaga Kemajuan Tanah Persekutuan (Felda), Ibrahim Bin Ismail dan Felda Palm Industries Sdn Bhd dalam guaman mahkamah Tinggi di Kota Bharu Guaman No. 22-85-2002 dan bayaran dibuat untuk jumlah yang didapati hendaklah dibuat.

(b) Defendan-Defendan mengemukakan butir-butir terperinci seperti berikut:

(i) Jumlah wang Penghakiman serta faedah yang diperolehi dari tindakan Guaman No. 22-85-2002 difailkan sehingga selesai proses rayuan dan permohonan untuk kebenaran semakan kehakiman iaitu pada 26.8.2010;

(ii) Faedah ke atas wang Penghakiman dari 8.5.2008 hingga 26.8.2010 yang disimpan di dalam akaun bersama di Maybank yang dibuka di atas nama peguamcara Tetuan Wong Lu Peen & Tunku Alina dan Defendan-Defendan berkaitan wang Penghakiman tersebut;

(iii) Faedah ke atas wang Penghakiman dari 26.8.2010 hingga 1.10.2010 dan/atau penyerahan sebahagian wang Penghakiman kepada Plaintif-Plaintif yang disimpan di dalam akaun Defendan-Defendan berkaitan wang Penghakiman tersebut;

(iv) Kos-kos yang diberikan oleh Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan yang Defendan-Defendan perolehi sepanjang mengendalikan kes;

(v) Jumlah wang Penghakiman yang setiap Plaintif-Plaintif sepatutnya terima;

(vi) Yuran guaman serta kos pengurusan yang dikenakan;

(vii) Sama ada bil berkaitan yuran guaman telah disediakan dan dihantar dan jika ada tarikh dihantar.

(c) Bayaran dibuat oleh Defendan Pertama dan Defendan Kedua kepada Plaintif-Plaintif untuk jumlah yang kena dibayar atau didapati berhutang kepada Plaintif-Plaintif atas pengambilan akaun tersebut.

Defendants' Defence

[9] According to the amended statement of defence, the defendants contend that the plaintiffs were not entitled to the relief sought on the following grounds:

(i) a committee ("Jawatankuasa Suara Hati") was appointed by the plaintiffs to handle matters relating to the FELDA suit;

(ii) one of the committee members Awang Soh bin Mohammad (deceased, 8 July 2013) was appointed by the committee to negotiate and communicate with the prospective solicitors on the FELDA suit;

(iii) there was an arrangement between the plaintiffs and the defendants that the legal fees will only be payable after the FELDA suit came to an end;

A (iv) there were initial discussions as to payment but no fixed sum was agreed as the defendants' fees;

(v) after the decision of the Court of Appeal, the defendants issued invoices to each of the plaintiffs for a sum of RM15,000;

B (vi) the plaintiffs did not dispute these invoices within the six month period prescribed under s. 26 of the Legal Profession Act 1976 (LPA 1976);

(vii) on 19 October 2009, the committee and the defendants agreed to a reduction of the invoice amount by 15%;

C (viii) the defendants then paid out the revised legal fees from the judgment sum which amounted to RM4,636,572; and

(ix) the plaintiffs were each paid a sum of RM19,000.

Findings Of The High Court

D **[10]** The learned judge allowed the claim under prayer (b)(v) and dismissed the plaintiffs' claim for an order for an account to be taken.

[11] In his oral judgment given on 14 October 2014, the learned judge said that he did not allow the application for an account because the plaintiffs are aware of the judgment sum and interest which was obtained. However, the E learned judge also said that it is the defendants' duty to explain to the plaintiffs why they were only paid RM19,000 when according to the judgment sum, the plaintiffs were each entitled to receive RM30,000.

[12] The learned judge also found that the plaintiffs have not been served with the invoices for the legal fees deducted by the defendants. The learned F judge rejected the defendants' contention that they have served the invoices on the plaintiffs through the committee. Accordingly, the learned judge also rejected the defendants' argument that the bills are final as the plaintiffs failed to tax the bill of costs within six months from the date the invoices were issued.

G **[13]** The learned judge also found that the plaintiffs had given authority to the committee to act on their behalf; and that it was agreed that the legal fees were on a contingency basis - whereby the defendants are entitled to receive 50% of the judgment sum.

H **[14]** The learned judge also found that in all the circumstances, the legal fees should be calculated at the rate of 30% which is a fair and reasonable for both parties. As such, the learned judge also said that the plaintiffs are entitled to receive 70% of the judgment sum.

[15] In his written judgment dated 6 July 2015, the learned judge said:

I Setelah mendengar keterangan saksi Plaintif-Plaintif dan Defendan-Defendan, meneliti Ikatan Pliding dan Ikatan Dokumen-Dokumen yang difailkan, mengambil kira hujahan bertulis dan hujahan lisan pihak-pihak,

saya mendapati atas imbangan kebarangkalian, Plaintif-Plaintif telah gagal membuktikan tuntutannya ke atas Defendan-Defendan sebagaimana yang diplidkan dalam Writ dan penyata Tuntutan Terpinda kecuali tuntutan di perenggan 23(b)(v). Ekoran daripada itu saya memutuskan setiap Plaintif-Plaintif sewajarnya menerima bayaran RM22,670.00. Oleh kerana setiap Plaintif telah pun menerima-dibayar RM19,000.00, saya membuat perintah Defendan-Defendan dikehendaki membuat bayaran tambahan RM3,670.00 (RM22,670.00 - RM19,000.00) kepada setiap Plaintif.

Submission Of Parties

[16] Learned counsel for the defendants argued that the plaintiffs did not challenge the invoices which were issued by the defendants. In allowing prayer (b)(v) of the claim, the learned judge effectively taxed the bill which he should not have done.

[17] Learned counsel for the defendants also argued that the learned judge found that service of the invoices to be a non-issue even though he found that the plaintiffs were not served with the invoices by the defendants. The learned judge should have stopped at the first stage and granted prayer (a) only.

[18] In reply, learned counsel for the plaintiffs submitted that the learned judge erred in holding that the plaintiffs' application for an account under O. 43 of the Rules of Court 2012 (ROC 2012) to be redundant as the plaintiffs already had the information of the same in their possession. The defendants were acting for the plaintiffs at the material time and they have received money on behalf of the plaintiffs. As such, the defendants are the accounting party and are bound to render a detailed account of all monies or property received by the defendants in that capacity (*Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal* [2013] 2 CLJ 734, 746 (CA)).

[19] Learned counsel for the plaintiffs also submitted that the learned judge found that the invoices were excessive and reduced the amount. The learned judge also found that the invoices were not served on the plaintiffs as there was no evidence of service or acknowledgement of service. Even though the learned judge also found that as a fact that the fees charged by the defendants were based on a contingency basis, the learned judge erred in holding that the contingency fee agreement is illegal (ss. 24 and 66 of the Contracts Act 1950; s. 112(1)(b) LPA 1976). In granting prayer (b)(v) alone of the statement of claim, the learned judge had given effect to the contingency fee which is illegal; when the learned judge ought to have granted prayers (a), (b) and (c) altogether.

[20] Learned counsel for the plaintiffs also submitted that the defendants refused to render accounts despite three letters written by the plaintiffs' solicitors before the filing of the suit.

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Our Decision

[21] At the heart of this appeal are three core issues which were canvassed before us. The first relates to the question of whether the fees were charged on a contingency basis. Second, whether the invoices issued by the defendants for the fees were served on the plaintiffs. Third, whether the plaintiffs are entitled to an order that an account be taken pursuant to O. 43 of the Rules of Court 2012 (ROC 2012).

B

[22] On the first issue, it is pertinent to note that the fact that the fees were charged on a contingency basis is not really contested. SD2 alluded to this fact in his evidence and said that the initial rate was 50% of the judgment sum recovered; the rate was reduced to 35% subsequently. The learned judge's finding that there was a contingency fee arrangement is consistent with the facts as disclosed by the evidence. The question on the legality and enforceability of contingency fees will be addressed in para. [31] below.

C

D

[23] On the second issue relating to the service of the invoices on the plaintiffs, we note SD2's evidence that the invoices were sent to the committee. However, SD1 testified that the invoices were kept at his house for self-collection by the plaintiffs; but SD1 later said that the invoices were handed to the secretary of the committee for distribution to the plaintiffs. More significantly, SD1 admitted that he did not send the invoices to the plaintiffs. We have perused the appeal record and are satisfied that the learned judge's finding that the plaintiffs have not been served with the invoices is also consistent with the totality of the evidence.

E

[24] Thirdly, the plaintiffs' application is made pursuant to O. 43 of the ROC 2012 for accounts and inquiry to be taken on payments received by the defendants pursuant to a judgment obtained under the FELDA suit. In essence, the plaintiffs' application is for accounts to be made and inquiries taken of the payments in question so as to determine what is due from the defendants to the plaintiffs.

F

G

[25] In an action for an account, it is for the plaintiffs to show that the defendants are obliged to account to the plaintiffs for the monies in question. In *Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal* (*supra*), the Court of Appeal outlined the underlying principles relating to the remedy of an account as follows at p. 746 para. 27:

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> [27] … A plaintiff who seeks the remedy of an account must prove that firstly, the defendant is an accounting party and secondly, the plaintiff is entitled to some sum of monies from the defendant. The latter is important as the remedy of account is not for the purpose of discovery. (See: *Civil Remedies in Malaysia* by Cheong May Fong [2007] Sweet & Maxwell Asia - at p. 390).

I

[26] In this instance, the defendants were acting as the solicitors for the plaintiffs in the FELDA suit. The monies that were paid to the defendants were made toward satisfaction of the judgment sum, interest and costs in the FELDA suit.

[27] On a careful scrutiny of both the oral and written judgments of the learned judge, it would appear that in dismissing the plaintiffs' application for an account, the learned judge did not address his mind to the question of whether the defendants are an accounting party to the plaintiffs.

[28] In this case, the incontrovertible fact is that the defendants were acting as solicitors for the plaintiffs in the FELDA suit; the payments were made to defendants in their capacity as solicitors for the plaintiffs. As solicitors for the plaintiffs in the FELDA suit, the defendants stand in a fiduciary relationship of trust and confidence with the plaintiffs. As to the meaning of fiduciary, it is instructive to refer to the instructive passages at pp. 744, 745 and 747 of the judgment of the Court of Appeal in *Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal* (*supra*).

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary (See: *Bristol and West Building Society v. Mothew* [1996] 4 All ER 698, the English Court of Appeal).
>
> The accepted traditional categories of fiduciary relationship usually arise in matters involving trustee beneficiary, agent-principal, solicitor-client, employee-employer, director-company, and partners' *inter se* relationships. Unless expressly provided for in an agreement commercial transactions falling outside the accepted traditional categories of fiduciary relationship (as in the present case) often do not give rise to fiduciary duties, because they do not meet the criteria for characterisation as fiduciary in nature (See: *John Alexander Clubs - supra).*
>
> From the above authorities, for there to exist a complete cause of action for taking of accounts, the respondent has to plead and prove the following:
>
> (a) the appellant (as the defendant) must be liable to pay a certain sum of monies to the respondent (as the plaintiff); and
>
> (b) the appellant (as the defendant) is an accounting party to the respondent (the plaintiff).

[29] Applying the well-established principles enunciated above, we hold that the defendants *qua* solicitors for the plaintiffs in the FELDA suit stand in a relationship of trust and confidence with the plaintiffs; accordingly, the defendants are therefore fiduciaries and the payments were received by the defendants in their capacity as fiduciaries for the plaintiffs. Consequently, the defendants are liable to pay the judgment sum to the plaintiffs. As such, the defendants are an accounting party to the plaintiffs.

A **[30]** In the light of the particular circumstances of this case, we take the view it is just and reasonable that an order for an account and inquiries on the terms as prayed by the plaintiffs should be allowed.

[31] We will now address the question of the validity of the contingency fee arrangement. Learned counsel for the defendants argued that the learned B judge erred in finding that revised legal fees were the subject of a contingency arrangement. There was an erroneous assumption of the facts and the pleaded case. The revised legal fees being a contingent fee payment was not a pleaded issue (*Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430, 437-438 (FC)). As such, learned counsel argued that the learned C judge had in effect recast the claim of the plaintiffs (*Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196).

[32] We agree with the submission of learned counsel for the defendants. The revised legal fees arrangement was not pleaded; as such, the learned judge erred in making a finding on an unpleaded issue of fact and law. D Accordingly, we are constrained to set aside the finding of the learned judge on this point.

[33] At any rate, finding of the learned judge that the invoices were not served on the plaintiffs. Since the invoices were never served the defendants' argument that there was no challenge of the invoices runs hollow as it was E impossible for the plaintiffs to challenge the invoices. On the above premise, it also follows that the defendants' argument that they were entitled to deduct the revised legal fees is also a non-starter.

[34] We also note that in his judgment the learned judge had in effect taxed F the amount due as legal fees even though it was not a consideration before him. Whilst one may appreciate the sentiments behind the same, we take the view that there is no provision in law enabling the trial judge to do that. In this regard, we note that there are prescribed procedures for the taxation of a solicitor's bill of costs under the LPA 1976. In the circumstances, there was a clear misdirection on the part of the learned judge. We are therefore G constrained to set aside the decision of the learned judge taxing the amount due as legal fees.

[35] For the foregoing reasons, the defendants' appeal 1850 was dismissed with costs. The plaintiffs' appeal 1881 was allowed on the following terms:

H Prayers 23(a), (b)(i) to (v) and (c) are allowed.

Prayers 23(b)(vi) and (vii) and (d) are dismissed.

Deposits to be refunded.

I